IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 19, 2008 Session

GERRY G. KINSLER v. BERKLINE, LLC

Appeal from the Circuit Court for Hamblen County
No. 06CV148 Thomas J. Wright, Judge

No. E2007-02602-COA-R3-CV - FILED OCTOBER 27, 2008

Gerry G. Kinsler ("Employee") brought suit for retaliatory discharge after being terminated from his employment with Berkline, LLC, ("Employer") three days after he backed out of a workers' compensation settlement. The trial court entered summary judgment for Employer, holding that "timing alone is insufficient to withstand [Employer's] motion for summary judgment . . . ." On appeal, Employee argues that the Supreme Court's holding in ***Allen v. McPhee***, 240 S.W.3d 803 (Tenn. 2007) – that "proof of close temporal proximity alone can establish causation, . . ." – is applicable to the facts of this case. We agree. We also hold that genuine issues of material fact concerning the Employer's explanation for termination preclude summary judgment. Accordingly, we vacate the trial court's judgment and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court, Vacated; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, SP.J., joined.

Mark S. Stapleton, Rogersville, Tennessee, and W. Lewis Jenkins, Jr., Dyersburg, Tennessee, for the appellant, Gerry G. Kinsler.

Kelly A. Campbell, Morristown, Tennessee, for the appellee, Berkline, LLC.

OPINION

I.

In this case, the core facts are not in dispute. As an introductory matter, we state those facts as found by the trial court:

> 1. [Employee] was an employee of [Employer] for 29 years.
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> 2. He suffered a work related injury while working as a maintenance multicraftsman in June of 2005.
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> 3. After being released to return to work with permanent restrictions, [Employer] returned Employee to work with modified job duties in the maintenance workshop.
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> 4. [Employee] did not want to continue working in the maintenance workshop and requested to be returned to his former position as a maintenance multicraftsman.
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> 5. [Employee] had a permanent restriction from his work-related injury of no lifting over 30 pounds. Prior to his injury, [Employee] had no permanent physical restrictions.
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> 6. [Employer's] job description for a maintenance multicraftsman, which was developed in 1992, states that the position requires they be able to occasionally lift up to 75 pounds and frequently lift up to 50 pounds.
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> 7. In late 2005, because of [Employee's] request to return to the multicraftsman position, [Employer] obtained a Job Site Evaluation for the maintenance multicraftsman position. This evaluation was performed by a physical therapist with a masters degree.
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> 8. The evaluation involved observing the job being performed in the plant as well as interviewing [Employee] and others about job duties.
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> 9. In comparing the physical demands of the position with the Functional Capacity Evaluation for [Employee], the physical therapist concluded that [Employee] "does not have the functional capacities or capabilities to perform all of the essential duties or meet all of the physical demand requirements of a Maintenance Multicraftsman."
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> 10. [Employee] initially agreed to a settlement of his workers' compensation claim but changed his mind and rejected the proposed settlement at the settlement approval conference on January 9, 2005.

11. On January 12, 2005, Employee was fired.

As will be seen, there are other material facts that are in dispute and these genuine issues of material fact prompt our decision to vacate the trial court's grant of summary judgment to Employer.

II.

The Employee's issues, as taken verbatim from his brief, are as follows:

> 1. Whether summary judgment should be granted in a retaliatory discharge case when the reason for which the employer ostensibly terminated the employee, the employee's physical ability to perform the job, is disputed by the employee's testimony and the actual practice in the job, and when the termination occurred three days after the employee rejected a proposal from the employer to settle the underlying workers' compensation case.
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> 2. Whether the concept that "proximity in time is insufficient alone to demonstrate causation" in a retaliatory discharge matter has been abrogated or overruled by ***Allen v. McPhee***, 240 S.W.3d 803 (Tenn. 2007).

III.

A.

A cause of action for retaliatory discharge, where the discharge is based upon the filing of a workers' compensation claim, is actionable in this state. ***Clanton v. Cain-Sloan Co.***, 677 S.W.2d 441, 444-45 (Tenn. 1984). The Tennessee Supreme Court has recognized the following elements as being necessary to establish a cause of action for such a retaliatory discharge: (1) employment of the plaintiff by the defendant at the time of the alleged injury; (2) a claim for workers' compensation benefits against the defendant employer by the plaintiff employee; (3) termination of the plaintiff by the defendant; and (4) the plaintiff's claim for compensation benefits was a substantial factor in the employer's motivation to terminate the employees' employment. ***Anderson v. Standard Register Co.***, 857 S.W.2d 555, 558 (Tenn. 1993). The burden of proof is upon the plaintiff to show the elements, "including a causal relationship between the claim for workers' compensation benefits and the termination of the employment." ***Id***. at 558-59. If there is no proof on the causation link the case is not one for a jury. ***Id***. at 558-59. However, if there is proof of a "causal link," the burden shifts to the employer to show "a legitimate, non-pretextual reason for the employee's discharge." ***Id***. at 559.

B.

In deciding whether a grant of summary judgment is appropriate, courts are to determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04 (2007). Courts "must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn. 1993). Courts should grant a motion for summary judgment only when both the facts and the inferences to be drawn from them permit a reasonable person to reach only one conclusion. *See* ***McCall v. Wilder***, 913 S.W.2d 150, 153 (Tenn. 1995); ***Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995); ***Staples v. SBL & Assocs., Inc.***, 15 S.W.3d 83, 89 (Tenn. 2000).

The issues a court must consider in determining whether to grant a motion for summary judgment are "(1) whether a *factual* dispute exists, (2) whether that fact is *material*, and (3) whether that fact creates a *genuine* issue for trial." ***Byrd,*** 847 S.W.2d at 214 (emphasis in original). "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." ***Id***. The phrase "genuine issue" refers exclusively to factual issues and not to legal conclusions that could be drawn from the facts. ***Id***. at 211.

The party seeking summary judgment (here, the employer Berkline, LLC) has the burden of demonstrating that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. ***Id***. at 215. Generally, a defendant seeking summary judgment may meet this burden in one of two ways: (1) by affirmatively negating an essential element of the plaintiff's case or (2) by conclusively establishing an affirmative defense. ***Id***. at 215 n. 5. "A conclusory assertion that the nonmoving party has no evidence is clearly insufficient." ***Id***. at 215.

Once the moving party satisfies its burden of showing that there is no genuine issue of material fact, the burden then shifts to the nonmoving party to show that there is a genuine issue of material fact requiring submission to the trier of fact. ***Id***. The nonmoving party cannot simply rely upon its pleadings, but rather must set forth, by affidavit or discovery materials, specific facts showing a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.06 (2007); ***Byrd***, 847 S.W.2d at 215-16.

IV.

A.

We address initially whether Employee has stated a prima facie case of discharge by Employer in retaliation for his filing of a claim for workers' compensation benefits.[1] The trial court held that "[w]hile the timing of the decision to terminate [Employee] does support his retaliatory assertions, timing alone is insufficient to withstand [Employer's] properly supported motion for summary judgment." In support of its holding, the court cited ***Conatser v. Clarksville Coca-Cola Bottling Co.***, 920 S.W.2d 646 (Tenn. 1995). In ***Conatse***r, the Supreme Court states a slightly different proposition, however, noting that "proximity in time without evidence of satisfactory job performance does not make a *prima facie* case." ***Id***. at 648.

Employee in this case argues that the rule adopted in the case of ***Allen v. McPhee***, 240 S.W.3d 803 (Tenn. 2007) as to proximity in time, applies in this retaliatory discharge case. In ***Allen***, the Supreme Court held that "close temporal proximity of a complaint and a materially adverse action are sufficient to establish a prima facie case of causation." ***Id***. at 823. Employer argues that the rule concerning proximity in time stated in ***Allen*** mentions a "complaint." The Employer then notes that Employee filed his complaint for workers' compensation "several months before . . . his termination." In this case, however, Employee does not claim that he was terminated for filing a claim for workers' compensation benefits; he claims he was terminated for *rejecting* a workers' compensation settlement three days before his termination. Furthermore, the portion of ***Allen*** quoted by Employer is better understood when the quote is stated in context:

> A majority of [federal] circuits have held that proof of close temporal proximity alone can establish causation, at least for purposes of stating a prima facie case. We adopt the majority rule and hold that close temporal proximity of a complaint and a materially adverse action are sufficient to establish a prima facie case of causation.

Id. (citations omitted). It is important to recognize that the ***Allen*** court, after adopting the majority rule, applied it to the case then before the court – a case in which *a complaint had been filed* under the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 *et seq.* "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used." ***Nat'l Life & Acc. Ins. Co. v. Eddings***, 188 Tenn. 512, 523, 221 S.W.2d 695, 699 (1949) (quoting ***Cohens v. Comm. of Virginia***, 6 Wheat. 264, 398, 19 U.S. 264, 398, 5 L.Ed. 257, 290).

Employer attempts to distinguish ***Allen*** by noting, correctly, that ***Allen*** involves "a claim under the Tennessee Human Rights Act for an alleged sexually hostile work environment and retaliation under the THRA." However, we reject the notion that this difference renders ***Allen***

[1] Employer acknowledges, as it must, that refusing a workers' compensation settlement is an act protected from retaliation within the scheme of the workers' compensation statutes.

inapplicable to the instant case. The crucial point is not that ***Allen*** was a case under a different statute. The important point is that both this case and ***Allen*** *are employment law cases involving alleged retaliation*.

A general rule concerning the proximity in time between a protected action and retaliation has been used as an element or the element showing causation in a number of contexts in employment law. These include retaliation claims in cases involving race, age, religion, national origin, handicap and, finally, sex discrimination such as in ***Allen***. Tenn. Code Ann. § 4-21-101 *et seq*. (2005 & Supp. 2007); Tenn. Code Ann. § 8-50-103(a) (2002 & Supp. 2007). The concept is also used in cases stating claims under the common law or statute for retaliation for refusing to participate in or be silent about illegal activity at the work place. *See* Tenn. Code Ann. § 50-1-304 (2005 & Supp. 2007). *See, e.g.*, ***Provonsha v. Students Taking a Right Stand, Inc.***, No. E2007-00469-COA-R3-CV, 2007 WL 4232918, *5 (Tenn. Ct. App. E.S., filed December 3, 2007). A long line of cases involving common law and statutory claims of retaliatory discharge for filing a workers' compensation claim or claiming other rights or benefits under the workers' compensation statutes, as in the case now before the court, have considered whether proximity in time alone is sufficient to establish causation.[2] *See, e.g.*, ***Conatser,*** 920 S.W. 2d at 648 and its progeny.

As a relatively recent case, ***Allen*** has little citation history. In ***Haggard v. McCarter***, No. 3:06-CV-4, 2008 WL 276485 (E.D. Tenn., filed January 30, 2008), the federal district court for the Eastern District of Tennessee examined ***Allen***. Defending a claim of retaliation under the Tennessee Human Rights Act, the defendants argued that "temporal proximity alone does not satisfy the causal element for the prima facie case." ***Id***. at *5. The district court, however, quoted ***Allen*** and applied the ***Allen*** rule regarding proximity in time. ***Id***. *See also* ***Cole v. Tennessee Watercraft, Inc***., No.3:06-CV-381, 2008 WL 2783520, at * 13 (E.D. Tenn., filed July 15, 2008) (quoting ***Allen*** and stating: "Likewise, close temporal proximity is sufficient circumstantial evidence of a causal link for common law retaliation claims.").

In ***Allen***, the Tennessee Supreme Court adopted the majority rule regarding proximity in time, relying upon opinions of the Tenth, Seventh, Fifth and First Circuit Courts of Appeal. The Sixth Circuit, however, holds to the contrary—as the ***Allen*** Court noted. ***Allen***, 240 S.W.3d at 823 (citing ***Michael v. Caterpillar Fin. Servs. Corp***., 496 F.3d 584, 596 (6th Cir. 2007)). In a case subsequent to ***Allen*** involving a claim under the Tennessee law of retaliatory discharge for exercising rights under the workers' compensation statutes, the Sixth Circuit applied ***Conatser***. ***Ellis v. Buzzi Unicem USA***, No. 07-5660, 2008 WL 2521136, at *10-11 (6th Cir., filed June 24, 2008). Judge Moore of that court dissented, saying:

> The holding in ***Conatser*** that temporal proximity without other evidence of causation cannot establish a prima facie case, . . . is not reconcilable with the holding in ***Allen*** that temporal proximity is

[2] This list of causes of action is by no means exclusive. *See* ***Chism v. Mid-South Milling Co., Inc***., 762 S.W. 2d 552, 556 (Tenn. 1988) (extensive list of clearly defined public policies that could warrant protection from retaliatory discharge.)

> sufficient to establish a prima facie case, . . . We should not resolve this dilemma, however, by ignoring the Tennessee Supreme Court's decision in ***Allen***. Close examination of ***Allen*** reveals that the Tennessee Supreme Court adopted a new position in recognition of a recent doctrinal trend, citing five federal circuit court opinions that all issued after the earlier decision in ***Conatser***.
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> * * *
>
> I think the only reasonable conclusion is that ***Allen*** overturned ***Conatser's*** holding regarding temporal proximity.

Id. at *15 n.3. The majority addressed the dissent as follows:

> The dissent's reliance on the Tennessee Supreme Court's later decision in ***Allen v. McPhee***, 240 S.W.3d 803, 823 (Tenn. 2007), is misplaced here because the Tennessee Supreme Court had already decided the issue in ***Conaster*** [sic] and therefore ***Allen*** is not instructive in this respect.

Id. at *11. We disagree with the majority's decision in ***Ellis***.

Applying ***Allen***, we hold that proof of close proximity in time between an employee's exercise of a protected right under the workers' compensation statutes and a materially adverse employment action is sufficient to establish a prima facie case of causation. ***Allen***, 240 S.W.3d at 823. Applying that rule to the case on appeal we find that Employee stated a prima facie case of retaliatory discharge when he showed that he refused a workers' compensation settlement on January 9, 2006, and was terminated from his employment three days later. This, however, is not the end of the inquiry.

B.

Given that Employee has established a prima facie case of retaliatory discharge for having rejected a settlement of his workers' compensation claim, the next inquiry is whether the Employer has shown "a legitimate, non-pretextual reason for the employee's discharge." ***Anderson,*** 857 S.W.2d at 559. The trial court found that Employer discharged Employee "because of his unwillingness to perform the maintenance workshop job and his inability to perform his previous job, to which he insisted on returning."

There is apparently no dispute between the parties that Employer in this case has stated a *legitimate* reason for the termination. The inquiry thus is whether a genuine issue of material fact exists concerning the validity of the stated reason, *i.e.*, whether the reason is pretextual.

When Employee was released by his doctor to return to work following his injury, Employer created a job for him in the maintenance shop. The job involved sweeping floors, answering the

telephones and, for a time, working on air tools. During Employee's deposition the Employer's attorney asked the following question, "And after you were put into that position, working in the shop—and, again I'm talking about after the permanent restrictions had been imposed—did you express dissatisfaction about being in that job?" Employee replied, "Oh. No, I wasn't dissatisfied. No. I wanted to do what I used to do, except the lifting. I felt like I could do ninety percent of it. I enjoy electrical work, and that's what I'm licensed to do." Despite this answer, Employer's attorney continued to ask leading questions – as the attorney had a right to do – that included a predicate that assumed Employee was dissatisfied, and Employee answered the questions. Employee made clear statements, however, to the effect that he wanted to be productive. For example, Employee said that he just wanted to "see if I couldn't get out and start doing more in the shop." He also said, "I felt like I could do a lot more than they was having me do" and "Ninety— eighty percent of my time I was just sitting there in the shop not doing nothing, and I was bored."

For purposes of assessing summary judgment, the court must take the strongest legitimate view of the evidence in favor of the non-moving party. Taking that view, we credit Employee's statements that he was *not* dissatisfied. Direct evidence of motivation is rare. ***Guy v. Mutual of Omaha Ins. Co.***, 79 S.W.3d 528, 534 (Tenn. 2002). Thus, plaintiffs must necessarily rely on the inferences drawn from circumstantial evidence. Employee argues in this court that an inference of retaliatory motive can be drawn from Employer's insistence on describing Employee's stated desire to be doing more productive work as "unwillingness" to do the temporary job or "dissatisfaction." A genuine issue of material fact exists concerning whether Employee was unwilling to perform the temporary job Employer assigned, which was one of Employer's stated bases for termination.[3]

The trial court also found that Employee was unable to perform his prior job as maintenance multicraftsman. A job description for a maintenance multicraftsman, which was developed in 1992, states that the position requires the employee to be able to occasionally lift up to 75 pounds and frequently lift up to 50 pounds. As found by the trial court, Employee had a permanent restriction from his work-related injury of no lifting over 30 pounds.

Employer argues that it terminated Employee, in part, "[b]ased on the inability of [Employee] to perform the essential functions and physical requirements of the Maintenance Multicraftsman position . . . ." The job description for the position was old, but Employer had a job site evaluation performed. Employer cites and quotes that evaluation to support its position. Employer relies on the sentence "[Employee] presently does not have the functional capacities or capabilities to perform *all* the essential duties or meet *all* of the physical demand requirements of a Maintenence Multicraftsman." (Emphasis added.) Employer neglects to quote the next sentence of the evaluation titled, "Recommendations" that says:

> 1. [Employee] will continue to work with restrictions as a Maintenance Multicraftsman within the maintenance department at [Employer]. His specific work assignments will be based on

[3] There is also a dispute whether Employee was offered and turned down another job.

> company policies and procedures regarding employees who are working with medical restrictions.
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> 2. In the future, [Employee] could be re-evaluated by Dr. Ivy to determine if his work restrictions need to be upgraded. Additional functional testing may be needed to objectively evaluate his functional capacities and capabilities.

There was deposition testimony by James Gann, a maintenance facilitator—a lead man over maintenance multicraftsmen—that Gann himself had lifting restrictions of "fifty pounds, no higher than [his] waist." He also had a hand injury and had recently had heart surgery. When asked if he, Gann, engaged in multicraftsman's type work, he said, "Yes, depending on our work schedule for the day. Sometimes every day I have to go out and work on the floor with the guys." We agree with Employee that Mr. Gann's situation shows that the work of a multicraftman can be done, and is done, by employees with restrictions that are not compatible with the 1992 job description[4]. It also is some evidence that Employer may be inconsistent in the application of the lifting requirement in its job description.

These facts suggest that the job description's requirements are not the sole consideration in defining what the essential functions of the job are and that Employer recognizes this fact. In recommending that Employee should continue in the position of multicraftsman, the job site evaluator also at least implicitly recognized the job description is not the sole or controlling factor in determinating whether an employee can perform a job.

Employee argues that a determination of what constitute the essential functions of a job should be a detailed inquiry and reflect the actual functioning and circumstances of the job. Employee relies on analogous employment law,[5] citing ***Hall v. U.S. Postal Serv***., 857 F.2d 1073, 1079 (6th Cir. 1988) to this effect; *see also* 42 U.S.C. § 12111(8) (2005) (under Americans with Disabilities Act, job description merely evidence of essential functions of job).

In ***Hall***, a case under the Rehabilitation Act, the court found a genuine issue of material fact concerning whether a 70-pound lifting requirement was an essential function of a mail distribution clerk's job. The lower court had concluded that it must accept the employer's job description as controlling and, since the employee admittedly could not lift 70 pounds, the lower court concluded that there was no fact issue as to the employee's inability to perform the job. The Sixth Circuit disagreed.

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[4] Employee argues that Gann was similarly-situated and treated differently in that Gann accepted a workers' compensation settlement and kept his job while Employee rejected his workers' compensation settlement and lost his job. The trial court found that Gann rejected his initial workers' compensation settlement offer and thus was not similarly-situated to Employee. We agree.

[5] Although Tennessee courts are not bound by federal law, they may look to analogous federal law for guidance. *See* ***Campbell v. Fla. Steel Corp***., 919 S.W.2d 26, 31 (1996).

In this case, as in ***Hall***, the lower court concluded it must accept the job description as controlling, and without making a fact-specific inquiry or crediting all the testimony concerning the actual job functions, concluded that because of his lifting restrictions, Employee, could not perform the essential functions of his job.

Employee testified that in his 12 years as a maintenance multicraftsman he had to lift 10 pounds on a regular basis and 75 pounds occasionally—perhaps five times a year. He also said that the employees worked together to do any heavy lifting and he never did it alone. Employee indicated that the maintenance multicraftman employees used mechanical assistance, such as floor jacks, tow motors and other equipment. Dennis Carper, Senior Vice-President of Human Resources for Employer, agreed that the employees helped each other lift, that it was common to get help in lifting and that it was also common to use tow motors and other equipment to assist in lifting. We thus find that there is a genuine issue of material fact as to what constitute the essential functions of the maintenance multicraftsman position.

Further, Employer acknowledges that a dispute exists concerning whether Employee was capable of performing the maintenance multicraftman job. Employer states, however, "A dispute, no matter how genuine, as to a fact that is not material, is irrelevant." The trial court found, however, that Employer discharged Employee "because of his unwillingness to perform the maintenance workshop job *and his inability to perform his previous job . . . .*" (Emphasis added.) When Employer relied on Employee's alleged inability to perform the essential functions of his job as a basis for termination, Employer made that dispute both material and relevant. Taking the strongest legitimate view of the evidence in favor of the non-moving party, we find that there is a genuine issue of material fact concerning not only what the essential functions of the position of maintenance multicraftsman are, but also whether Employee could perform those functions.

V.

We vacate the trial court's grant of summary judgment. This case is remanded to the trial court for further proceedings. Costs on appeal are taxed to the appellee, Berkline, LLC.

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CHARLES D. SUSANO, JR., JUDGE